FILED
JUL 3 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of The United States

OCTOBER TERM, 1955

No. 241

ELIE J. BOUDOIN,
Petitioner,

versus

LYKES BROS. STEAMSHIP COMPANY, INC.,
Respondent.

Petition For a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No.

ELIE J. BOUDOIN,

Petitioner,

versus

LYKES BROS. STEAMSHIP COMPANY, INC.,

Respondent.

Petition For a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Elie J. Boudoin with respect shows unto this Honorable Court as follows, to-wit:

CITATIONS TO OFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The Trial Court's opinion is reported as *Boudoin v. Lykes Bros. Steamship Co., Inc.*, 112 F. Supp. 177-180 (D.C.E.D., La., 1953). The opinion of which review is here sought is reported as *Lykes Bros. Steamship Co., Inc., v. Bou-*

doin, and reverse title, 231 F. 2d 446 (CCA 5th, 1956).

These opinions may also be found in APPENDIX I hereof.

GROUNDS FOR THE COURT'S JURISDICTION

The jurisdiction of this Honorable Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C. A. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Should a litigant be denied recovery for injuries to his brain and central nervous system because such injuries, by their nature, are not fully demonstrable without surgery or autopsy?

2. What is the legal degree of "reasonable certainty" required to prove that physical and neurological injuries are caused by trauma, when such injuries are invisible but are demonstrable by objective scientific tests?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provision applicable to the instant matter is Article 3, Section 2, Clause 1, reading:

> "The judicial power shall extend to all cases . . . of admiralty and maritime jurisdiction; . . ."

Liability in this case was predicated by this Honorable Court upon the General Maritime Law theory of a breach of the warranty of seaworthiness when the case was before the Court for review under docket number 406, October Term, 1954.

STATEMENT OF THE CASE

This was a suit by an American seaman against the owner and operator of an ocean going freighter, the *Mason Lykes*, on which he was formerly employed.

The defendant-employer maintains its principal office in New Orleans, Louisiana, and the action was brought under the Jones Act and the General Maritime Law. A jury was waived.

Petitioner was employed in the engine department as an oiler. The ship had a deck maintenance man, named Manuel Gonzales. Petitioner's injury was inflicted by Gonzales who went to petitioner's room and took a bottle of brandy from under petitioner's bed. Petitioner awoke, startled; and Gonzales attacked him with the bottle, causing severe injuries.

The full bottle of brandy, used by Gonzales as the assault weapon, broke upon impact with petitioner's skull, as a result of which petitioner sustained cerebral concussion, brain trauma, and a deep laceration on the back of his head requiring cauterization and 18 sutures for closure.

Petitioner was confined to bed aboard the vessel from November 25, 1949, until December 19, 1949, when the for-

eign voyage terminated. Petitioner then received outpatient care from the United States Public Health Service Hospital at New Orleans from December 19, 1949, to February 15, 1950, when he was admitted to the hospital where he remained until his discharge from hospital care on February 21, 1950.

From the time he was injured, petitioner complained of headaches and dizziness, which complaints have persisted. Petitioner's efforts to return to sea, attended by constant ship-motion, heavy labor and confinement in heated surroundings, resulted in an increase in the frequency and intensity of his symptoms.

After petitioner's discharge from the Public Health Service facilities, objective neurological tests made by a qualified expert were positive for brain damage. These positive, objective tests were: (1) nystagmus (oscillation of the eyeballs); (2) Babinski sign (abnormal reaction of the great toe to stimulus of foot-sole); and (3) facial asymetry, resulting from relaxation of muscles with impaired nerve supply.

The Trial Court awarded petitioner $600.00 for his lost wages and $1500.00 for his damages. There was specifically *excluded* from the award any amount for brain injury, on the ground that petitioner failed to prove to a "reasonable certainty" that the assault upon him by Gonzales caused the brain damage demonstrated by the tests.

When respondent appealed from the judgment holding it liable, petitioner cross-appealed to have the award increased to recover for his brain damage. The Court of Appeals for

the Fifth Circuit reversed, holding that there was no liability at all and, consequently, petitioner's cross-appeal was not noticed. On *certiorari*, this Honorable Court reversed the Court of Appeals and remanded the case to that Court for consideration of petitioner's cross-appeal. The case was restored to the docket of the Court of Appeals for the Fifth Circuit, submitted on supplemental briefs without oral argument, and, on April 12, 1956, the judgment of the Trial Court was affirmed, *Per Curiam*. Petitioner applies herewith for a writ of *certiorari* to have the judgment affirming the District Court reviewed in the light of the following:

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

It is petitioner's contention that the judgment of which review is sought approves an error of law committed by the Trial Court in holding that petitioner failed to sustain his legal burden of proving that his neurological injuries and deficiencies were caused by the heavy blow and severe injuries which Gonzales inflicted.

The Trial Court held that causal relationship of these deficiencies to the trauma was not proved to a reasonable certainty, that is, that petitioner had not sustained his "burden of proof".

I. *The Proof*

Mr. Boudoin was struck on the back of his head by the assailant with an unopened bottle of souvenir brandy, using such force as to break the glass bottle on his head (R. 91).

A quart of brandy, we know, would weigh approximately two pounds or more.

The Marine Hospital of the United Staes Public Health Service diagnosed Mr. Boudoin's condition as a "post-concussion syndrome" (R. 15, and Marine Hospital records). Post-concussion syndrome expresses brain injury symptoms (R. 15-16). Respondent's physician conceded that concussion is a very real thing (R. 201).

Expert medical testimony was offered by one physician on behalf of the petitioner, and by one for the respondent.

The neurologist summoned by petitioner testified that certain neurological tests applied to the petitioner showed positive results, representing neurological deficiencies, which, in his opinion, supported the conclusion that petitioner sustained brain damage as the result of this trauma (R. 7-45).

The other physician, who testified for respondent, expressed a contrary opinion. He testified "there were no neurological deficiencies" (R. 169).

The District Judge accredited the testimony of the first physician, finding that "some neurological tests applied to the petitioner have been positive, indicating brain damage of some kind" (R. 485). This neurologist further expressed the opinion that the disease in question (brain injury) is responsible for Mr. Boudoin's condition, and his symptoms are justified and to be expected from that kind of injury (R. 14). The causal relationship between the trauma from

the blow and the injury to the brain is established by this doctor's testimony, including the following portions:

"Mr. Boudoin complained of headaches and dizziness intermittently, since an injury in November, 1949. The injury was a blow to the head on the right side back of the ear with a glass bottle. Immediately following this injury patient had rather severe headaches, which might be expected, and bleeding from a lacerated scalp, which might be expected, but headaches did not clear up, but were severe enough to warrant his staying in bed for at least fifteen days, from the hospital record I have here, for a period of three weeks to a month. The patient says he was bedridden because of the severe headaches. A person who is hit over the head and maintains headaches that keep him in bed a month or three weeks, I would think received a head injury that was severe enough to put him in the hospital. Most people would recover from a minor head injury, but as he stayed in bed for three weeks, *I would say that shows indications of cerebral injury.* Since then the headaches are intermittent.

"The patient complains of constant headaches. Mr. Boudoin gets along well for a period of time and then he gets severe headaches that last two or three weeks. We find no organic headaches. He has symptoms of vertigo. If a person has a feeling of unsteadiness, or swaying, *it is due to the injury to the cerebral hemisphere over the back of the head, the cerebellum.* The significance of evaluating the complaint of vertigo is the most common

symptom of injury to the cerebellum, the back of the head and ear. On examining Mr. Boudoin we found a scar over the mastoid, showing his injury back of the skull, and the symptom we found was specifically vertigo, so we go along with that finding. In fact, he had a blow back of the head instead of the front, and the symptoms go along with that.

"It is significant he complained of nothing else but headaches and dizziness. In fact, the patient brought out he had excessive headaches when in hot surroundings. Mr. Boudoin says he can't go to sea because of his illness, so we have the symptom that seems to go along with posttraumatic headaches and posttraumatic vertigo.

"Ordinarily, we don't have neurological signs that long after an injury. When we do find specific organic neurological signs, we consider that a serious headache. In other words, some of those phases clear up in two or three years. Only those who do not clear up, have neurological signs. When I examined Mr. Boudoin, I was faced with neurological signs that could not be simulated, *unquestionably brain disease*. These signs are essential. The scar on the back of the head would indicate injury to the cerebellum, some part of the brain on the right side. There are two signs. Nystagmus, which means oscillation of the eyeballs, a movement uncertain of duration.

"Now the reason I say that, in this case, is specific, because it is a question of nystagmus asso-

ciated with the injury to the right side of the cerebellum, because this movement of the eyeball does not occur when the patient looks to the left, but only when the patient looks to the right or up. When the oscillation of the eyeball occurs just to one side, it means lesions to the cerebellum on the right side of the nervous system, such as would be due to an injury to the back of the skull on the right side.

"The oscillation of the eyeball can be due to several diseases, but the kind of oscillation of the eyeball Mr. Boudoin has is *due to the vestibulocerebral disease on the right side.* It rules out such things as drugs, congenital disease, other brain diseases. The oscillation is not specifically due to the cerebellum. It has a fast component looking to the right and slowly returning as he relaxes. As the patient looks to right, he jerks slowly and returns to position.

"He also has the Babinski sign. Mr. Boudoin has this so-called Babinski sign — named after a French neurologist at the turn of the Century — on the left side, the left lower extremities of the left foot. With an injury to the right side of the cerebellum, we expect a possible Babinski sign on the opposite side of the cerebellum, which controls the left foot. On the other hand we expect oscillation of the eyeballs on the right side. That is what Mr. Boudoin shows, left Babinski and right oscillation of the eyeball. That is a mechanical sign that points to a lesion in the same general location as the nystag-

mus would place it. If he had a Babinski on the right side, it wouldn't be helpful.

"Mr. Boudoin has asymmetry which may or may not be due to the injury. He has a flatness of the groove, nose and chin, flattening of the nasolabial fold to the side of the mouth. If you look at Mr. Boudoin you will notice that the lip on the left side sags down, that the groove between the nose and the lip on the left side is flat" (R. 9-12; emphasis added). * * *

"I felt it was necessary, before I could give an opinion, to determine whether there was evidence of multiple sclerosis or syphilis, or a brain tumor. A brain wave was done to get the information, which is usual long after an injury, unless an epileptic. I decided on X-rays and examination of the spinal fluid, which would show evidence of syphilis in various tests, also gave the colloidal gold test.

Those three tests will demonstrate whether there is syphilis, and they were perfectly normal. The next test was the depressor (pressure) test. If the patient had a tumor, the pressure would be increased. The pressure was perfectly normal.

"In this case, so far as I can determine from my study, *I can find no other disease that could be responsible for his condition. On the basis of that I feel his symptoms are justified, and what we can expect from that kind of injury*" (R. 14; emphasis and parenthesis added).

II. *The Legal Issue*

Respondent should not be heard to urge that this is a question of fact which was resolved adversely to petitioner by the Trial Court and that, therefore, the issue is not reviewable.

Actually, the Trial Court found that petitioner's tests showed he had brain damage; then, the Trial Court held that petitioner failed to sustain his legal burden of proving that this brain damage was caused by the assault.

Whether given facts are legally sufficient to support a conclusion *is a question of law*, reviewable for error when the Trial Court commits an error of law regarding the *onus probandi* of a party. In the instant case, the finding of fact by the Trial Court that the burden of proof was not met was influenced by an error of law. Under these circumstances, the rule that an appellate court will not disturb findings of fact made by the trial judge unless they are clearly erroneous does not apply if the Trial Judge has committed an error of law which has manifestly influenced or controlled his findings of fact, such as mistake as to the burden of proof or the degree of "reasonable certainty" required to legally establish a fact as proven. *Owen* v. *Commercial Union Fire Ins. Co. of New York*, 211 F. 2d 488 (CCA 4th, 1954); 3 Am. Jur., Appeal & Error, Sec. 904, p. 472; *Allis Chalmers Manufacturing Company* v. *Wichman*, 220 F. 2d 426 (CCA 8th, 1955).

III. *The Error of Law*

Essentially, the decision of the Court of Appeals, in affirming the Trial Court's apprecation of the burden of proof in

a case of the instant kind, is out of harmony with the spirit and the result of the decision of this Honorable Court in *McAllister* v. *United States*, 347 U. S. 932, 75 S. Ct. 6 (1954). Inherent in the *McAllister* decision, we submit, is the proposition that when there is uncertainty in a medical question, the burden of proof is satisfied by the balance of probabilities, supported by the best diagnostic methods and theories currently available to medical science for connecting cause with consequence. If the judgments of which review is sought remain uncorrected, litigants with subtle symptoms of real injuries stand to be prejudiced.

This is not a case in which we are asking this Honorable Court to judge the credibility of medical witnesses. The Trial Court did that. Comparison of the medical evidence with the Trial Court's Findings of Fact shows that the Trial Judge credited the testimony of the physician called by petitioner, rather than the testimony of respondent's doctor (the latter refused to admit even that the obvious brain-damage tests were positive, as the Trial Court so found).

The accepted legal method of establishing personal injuries and residuals is by introduction of expert medical opinion. By this method petitioner established the justice of his claim for brain damage. Having adduced the testimony of a credible expert, petitioner discharged his legal burden of proof. In holding otherwise, the Trial Judge erred.

> "If physicians are willing to estimate certain consequences as probable or possible, it is hardly proper for judges to affirm the untrustworthiness of these conclusions. This should apply as well to causes as to consequences.

> The burden of the scientific limitations of our society should not be cast on injured plaintiffs in circumstances such as existed in the instant case." *Brett v. J. M. Carras, Inc.*, 203 F. 2d 451, 453-54 (CCA 3d, 1953).

The Trial Court's error of law was committed by denying petitioner an award in some amount for his brain damage which the Trial Court found to exist. More specifically the Trial Court's error eminates from its holding that these neurological deficiencies were not proved, with legal "reasonable certainty", to have proximately resulted from the assault for which respondent has been held liable.

CONCLUSION

All that petitioner now seeks is to have his damage award assayed according to the standard recognized by this Honorable Court in the *McAllister* case, *supra*. In so doing, an opportunity will be presented to this Honorable Court to more clearly define the legal burden of proof devolving upon any litigant whose symptoms of real injury are subtle and not graphically demonstrable.

WHEREFORE, petitioner respectfully prays that this petition be granted and that a writ of *certiorari* issue herein, directed to the United States Court of Appeals for the Fifth Circuit, directing and ordering that Court to certify and send to this Honorable Court, for its review and determination, a full and complete transcript of the record of all proceedings in the cause entitled *Lykes Bros. Steamship Co., Inc.*, Appellant-Appellee versus *Elie J. Boudoin*, Appellee-Appellant" and reverse title, bearing Number 14,765 on the docket

of the Court of Appeals for the Fifth Circuit, to the end that the judgment and *Per Curiam* of said Court of Appeals may be reversed by this Honorable Court and the cause remanded to the Trial Court for allowance of petitioner's full damages, including damages for injuries to his brain;

Petitioner further prays for such other and further relief in the premises as to this Honorable Court may seem proper and just.

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CERTIFICATE OF SERVICE

I, the undersigned, being a member of the bar of the Supreme Court of the United States and one of the attorneys for the Petitioner, Elie J. Boudoin, do hereby certify that copies of this Petition for a Writ of Certiorari have been served upon Andrew R Martinez, Esq., of the firm of Terriberry, Young, Rault & Carroll, Attorneys for Respondent, Lykes Bros. Steamship Co., Inc., by delivering same to his offices at 825 Whitney Building, New Orleans, Louisiana, this ____ day of July, 1956.

I

APPENDIX

OPINIONS IN THE COURTS BELOW

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14,765

LYKES BROS. STEAMSHIP CO., INC.,
Appellant & Appellee,
versus

ELIE J. BOUDOIN,
Appellee & Appellant.

(AND REVERSE TITLE)

Appeals from the United States District Court for the Eastern District of Louisiana

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(April 12, 1956)

Before HUTCHESON, Chief Judge, and HOLMES and BORAH, Circuit Judges.

PER CURIAM:

The judgment of the District Court is AFFIRMED.

II

JUDGMENT

Extract from the Minutes of April 12, 1956.

No. 14765

LYKES BROS. STEAMSHIP CO., INC.,

versus

ELIE J. BOUDOIN,
(AND REVERSE TITLE)

WHEREAS, in cause No. 14765, between Lykes Bros. Steamship Co., Inc., appellant and appellee, and Elie J. Boudoin, appellee and appellant, a judgment was entered by this Court on March 26, 1954, reversing the judgment of the District Court appealed from, and rendering judgment in favor of appellant, Lykes Bros. Steamship Co., Inc., and against appellee, Elie J. Boudoin; and

WHEREAS, on February 28, 1955, the Supreme Court of the United States reversed with costs the judgment of this Court and issued its judgment to this Court remanding the cause for further proceedings in conformity with the opinion of said Supreme Court,

It is now ORDERED and ADJUDGED by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

III

It is further ORDERED and ADJUDGED that the appellant and appellee, Lykes Bros. Steamship Co., Inc., be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

No. 3532 CIVIL ACTION

ELIE J. BOUDOIN

versus

LYKES BROTHERS STEAMSHIP CO., INC.

Plaintiff, an American seaman, is suing the defendant as the owner and operator of an ocean freighter known as the MASON LYKES, on which vessel he was formerly employed. Plaintiff claims to have been assaulted by a fellow seaman aboard the vessel and bases his claim for recovery on allegations of negligence and unseaworthiness. The issues of fact and law having come on to be heard on the pleadings and proofs of the parties and due deliberation having been had, the court now makes the following findings of fact and conclusions of law:

IV

FINDINGS OF FACT

1. Plaintiff was employed aboard this vessel in the engine department in the capacity of oiler during a foreign voyage which commenced from and ended in New Orleans between the dates of September 6, 1949 and December 19, 1949. He received wages and overtime amounting to about $300.00 per month. During the same voyage the defendant also employed a deck-maintenanceman named Manuel Gonzales.

2. There occurred an "assault upon the person of Elie J. Boudoin, oiler, by Manuel Gonzales, deck-maintenance, on November 25, 1949, aboard ship at Walvis Bay, S. W. A.", and an entry to said effect was made in the official log book of the vessel.

3. A drinking party took place aboard the vessel during the late hours of November 24, 1949 and the early hours of November 25, 1949 in the living quarters of boatswain, Robert Oswald, and the deck-maintenanceman, Jacob Pali, which was attended by them and Manuel Gonzales.

4. The master and other officers were aboard the vessel while the drinking party was in progress in the boatswain's forecastle, and one of the officers was charged with being awake and having the watch duty, which watch duty included the hourly inspection of crew's quarters. The master and other officers of the vessel did nothing to terminate the drinking party in spite of the fact it was a violation of shipboard regulations to bring aboard ship or to consume aboard ship spiritous liquors.

5. During the course of the party a large quantity of liquor was consumed. Each of the principals at the party, namely, the boatswain, Gonzales and the deck-maintenance-man drank almost a full fifth of whiskey. A few drinks were consumed by other members of the crew who dropped in on the party.

6. The plaintiff had retired to bed in his quarters about 5:00 p.m. on November 24, 1949. He slept until about 1:30 the following morning, at which time he got up and went to the mess hall for a sandwich. On his way back to his own room the plaintiff passed the boatswain's room where he was offered a drink. He refused the offer and returned to his room.

7. Between 15 and 30 minutes later, while plaintiff was asleep or almost asleep in his bed, Manuel Gonzales came into the plaintiff's room and took a bottle of brandy from under the plaintiff's bed. When plaintiff was startled in the semi-darkness by the shape and person of Manuel Gonzales close at his bed, the plaintiff accosted the intruder, and Gonzales attacked the plaintiff, striking him on the back of the head with the bottle which he, Gonzales, had taken from under the plaintiff's bed.

8. Manuel Gonzales was in a drunken and disorderly condition when he intruded into plaintiff's room shortly before 2:00 a.m. for the apparent purpose of stealing a bottle of liquor.

9. A few minutes after Gonzales struck plaintiff with the bottle Gonzales appeared in the passageway in the vicinity of plaintiff's room with a large knife which he in-

tended to use on the plaintiff. The knife was taken from him by Andrew Brown, fireman-water tender and roommate of the plaintiff and Harry Brock, third mate of the vessel.

10. As a result of the blow which was struck by Manuel Gonzales, which blow caused his weapon, the full bottle of liquor, to break upon the plaintiff's head, the plaintiff sustained concussion and lacerations. The plaintiff received medical treatment from a doctor who was a passenger aboard the vessel. The treatment included the tieing off of severed blood vessels, the placing of 18 stitches in the deep cuts at the back of the plaintiff's head and cauterization of the wounds.

11. While the plaintiff was receiving medical treatment in the ship's hospital, Manuel Gonzales was outside the hospital door creating a disturbance. During that time, which was shortly after the assault, Manuel Gonzales stated that he was responsible for the plaintiff's condition, and that he wanted to give some of his blood for a transfusion. He called epithets into the sick-bay at the plaintiff. He refused to permit the mate on watch, Mr. Brock, to enter the room and threatened him with bodily injury.

12. About 8:00 a.m. on November 25, 1949, Manuel Gonzales was ordered to the master's cabin and there refused to make a statement relative to his affair with the plaintiff, and also refused his signature to the effect that he would not make a statement.

13. Thereafter Manuel Gonzales was sent to the ship's hospital to clean it, and, instead of completing the job, he left the vessel against orders.

14. About 1:00 p.m. on November 25, 1949, Manuel Gonzales returned to the vessel with two bottles of liquor, at which time the master apprehended him, took the bottles away, and placed him in irons. At the same time the master requested the shore police to take Manuel Gonzales into custody for safekeeping until the vessel sailed. The police declined to do so unless he was left behind for a court hearing several days later.

15. Manuel Gonzales was logged for failing to obey orders, and the master ordered that he pay all overtime necessary while the plaintiff was relieved from duty.

16. On the morning of November 26, 1949, Manuel Gonzales left the vessel without leave and did not return until the morning of November 28, 1949; he was logged for disobedience of orders; the master further ordered that Manuel Gonzales should be charged with the costs of transportation to and from the hospital and for x-rays.

17. On December 7, 1949 there was imposed on Manuel Gonzales the following fines: two days' pay for being absent without leave on November 26, 1949 and November 27, 1949; four days' pay for disobedience of orders in leaving ship after shore leave denied at Walvis Bay.

18. On the return of the MASON LYKES to the United States Manuel Gonzales was fired by the captain. Since

that time, however, he has sailed aboard several of defendant's vessels, including one at the time of trial.

19. Manuel Gonzales was a person of dangerous propensities and proclivities during the time he was employed aboard the Steamship MASON LYKES, including the time of his assault upon the plaintiff and prior thereto.

20. Manuel Gonzales was a person of violent character, belligerent disposition, excessive drinking habits, disposed to fighting and making threats and assaults.

21. Following his injuries, plaintiff was relieved from duties during the remainder of the voyage and remained under medical observation and treatment aboard the vessel. During that time he suffered from occasional headaches and dizziness and was administered medicine at intervals to ease pain, all as noted by the master in his statement attached to log entries.

22. Plaintiff was admitted to the United States Marine Hospital in New Orleans as an outpatient on December 19, 1949, and as a hospital patient on February 15, 1950. He was discharged as fit for duty on February 21, 1950. The diagnosis included healed scars of the posterior head and post-traumatic headaches. The plaintiff was also examined by private physicians. There was no treatment for his complaints other than rest and medication to relieve headaches.

23. The plaintiff did not return to work until August, 1950, when he obtained a job with the Municipal Sanitation Department, which he kept for about five months.

Later the plaintiff returned to his occupation as a merchant seaman. He made two sea voyages during 1951, one for two months and the other for four months, and a third and final sea voyage during 1952 for a period of one month.

24. The plaintiff testified that he has stopped going to sea because he is unable to perform his duties properly and comfortably. He complains that his headaches, dizziness and nervousness are increased and made worse by heavy labor and confinement aboard ship, the movement of the vessel at sea, and the heated surroundings in the engine-room.

25. The medical evidence supports the plaintiff's testimony to the extent that some neurological tests applied to the plaintiff have been positive, indicating brain damage of some kind. Plaintiff has failed to prove, however, to a reasonable certainty that the assault on him by Manuel Gonzales is responsible for his neurological condition.

26. The plaintiff received from the defendant maintenance at the rate of $6.00 per day covering a period of 43 days from December 20, 1949 to January 31, 1950, representing a total of $258.00. As a result of his injuries received aboard the MASON LYKES, however, he was not fit for duty until February 21, 1950.

CONCLUSIONS OF LAW

1. Jurisdiction of this action is properly laid under the Jones Act and the general maritime law.

2. The warranty of seaworthiness is a kind of liability without fault in which knowledge of the circumstances creating the unseaworthiness is immaterial. *Seas Shipping Company* v. *Sieracki*, 328 U. S. 85; *Work* v. *Leathers*, 97 U. S. 379; *The Edwin I. Morrison*, 153 U. S. 199, 210; *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, 100; *The H. A. Scandrett*, 87 F. 2d 708, 710; *Balado* v. *Lykes Bros. S. S. Co.*, 179 F. 2d 943, 945.

3. A shipowner's warranty of seaworthiness covers the competence of the crew as well as the integrity of the vessel. *The Osceola*, 189 U. S. 158; *Re Pacific Mail Steamship Company*, 130 F. 76; *The Rolph*, 299 F. 52; *Spellman* v. *American Barge Line*, 176 F. 2d 716; *Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515.

4. Applied to a seaman, such a warranty is not that the seaman is competent to meet all contingencies, but that he is equal in disposition and seamanship to the ordinary men in the calling. *Keen* v. *Overseas Tankship Corporation*, supra.

5. Manuel Gonzales was during the voyage in question not equal in disposition and seamanship to the ordinary men in the calling of seamen and his short-coming in this regard was a proximate cause of plaintiff's injuries.

6. It is the duty of officers of a vessel to maintain proper discipline among the crew and, particularly, to suppress those disorderly acts of seamen which may reasonably be expected to result in injury to members of the crew. *Jensen* v. *United States*, 184 F. 2d 72, 1950 A.M.C. 1797;

Koehler v. *Presque-Isle Transportation Company*, 141 F. 2d 490, 1944 A.M.C. 432.

7. The failure of the officers of the vessel to suppress the seamen's drinking party aboard ship which they knew or should have known had been going on for several hours and which they should have anticipated might lead to an assault by one seaman on another is negligence for which the defendant is liable under the Jones Act.

8. As a result of its breach of warranty of seaworthiness and the negligence of its officers, the defendant is liable to the plaintiff in the amount of $1500 for his injuries and $600 for loss of wages. In addition, the plaintiff is entitled to maintenance from February 1, 1950 to February 21, 1950.

May 14th, 1953.

Office - Supreme Court, U.S.
FILED
AUG 10 1956
JOHN T. FEY, Clerk

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Brief in Opposition to Petition for a Writ of Certiorari

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Petitioner,

versus

LYKES BROS. STEAMSHIP COMPANY, INC.,

Respondent.

Brief in Opposition to Petition for a Writ of Certiorari

STATEMENT OF THE CASE

MAY IT PLEASE THE COURT:

In the District Court petitioner claimed that the blow he received aboard respondent's vessel caused permanent injury to his brain. The denial by respondent of this assertion raised a purely factual issue for the Trial Court's decision. The Trial Court, after reviewing the evidence and hearing all of the medical witnesses in open court, rejected peti-

tioner's claim, and the judgment thereon was affirmed by the Court of Appeals.[1]

The somewhat voluminous evidence from which the courts below rejected petitioner's claim of brain damage was derived from at least five sources: (1) petitioner's testimony; (2) petitioner's medical expert; (3) respondent's expert; (4) the findings of the doctors at the Public Health Service Hospital; (5) and numerous exhibits from which inferences could and undoubtedly were drawn concerning petitioner's medical and employment capacity before and after the trauma aboard the MASON LYKES.

Without detailing all the evidence, briefly the record shows that petitioner from childhood suffered from and from time to time was disabled with a chronic osteomyelitis of the leg, a disease which incapacitated him for military service in the last war, R. 119. On two occasions after the trauma in question, this chronic ailment required in-patient medical attention, R. 120. Probably because of this pre-existing incapacity, for otherwise it remains unexplained,

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[1]Actually, as the Court of Appeals stated in its first opinion on liability, 211 F. (2d) 618, petitioner "attempted belatedly to appeal because of inadequacy . . .", since the judgment of the District Court was entered on May 22, 1953 but the appeal by petitioner to the Court of Appeals was not taken until July 21, 1953. While respondent filed motions in the District Court for a new trial, those motions did not accrue to the benefit of petitioner or extend his time to appeal if he were dissatisfied with the judgment. Rule 73 of the Federal Rules of Civil Procedure, *Continental Casualty Co.* vs. *United States*, 167 F. (2d) 107 (C.C.A. 9th 1948). In addition, it is well established that the trial court's assessment of damages will not be considered by an appellate court where no objection was made by the complaining party in the lower court and no opportunity was presented to the Trial Judge to correct the alleged error. See *Capella, et al* vs. *Zurich Gen. Acc. Liability Ins. Co., et al*, 194 F. (2d) 558, 560 (C.C.A. 5th 1952), and the record will show that no such effort was made by petitioner.

petitioner's maritime service was always erratic, as his Coast Guard record shows clearly that he rarely remained aboard one vessel, even before joining respondent's ship, longer than a few weeks at a time, and that he never sailed more than four to five months in any one year. Thus, the usual inference of genuine disability drawn from proof of full capacity for work before, and lack of such capacity after, an accident, did not here arise.

The injury aboard the MASON LYKES did not cause unconsciousness, and petitioner's condition thereafter did not indicate the presence of internal injury, R. 113 - 114. Brain damage from trauma is, of course, usually associated with immediate unconsciousness, and a lack of it, as established conclusively at the trial, spoke against petitioner's position, R. 185.

Petitioner was discharged as *fit for duty* by the Public Health Service doctors, the only impartial medical observers

to examine petitioner, on February 21, 1950, less than three months after the trauma.[2] It is of course significant that the Trial Judge found that petitioner's disability terminated on February 21, 1950. See Findings of Fact, No. 26. After his discharge from the hospital, petitioner did not thereafter receive or even seek additional medical attention for the injury (R. 120), despite the fact that, as has been said, he did seek and receive in-patient treatment on two occasions thereafter for his chronic leg condition, R. 120. During those years following his hospital discharge he worked for a time at sea and also ashore, driving a truck, operating a taxi, etc., and, on each job, always performed his work with regularity, R. 108-109. All of these facts spoke against petitioner's claim and no doubt weighed heavily in the Trial Court's award.

The first examination by petitioner's medical expert was not held until December, 1952, over three years after the

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[2]The findings covering petitioner's in-patient treatment just prior to his discharge from the hospital on February 21, 1950 are as follows:

Clinical Record

Date of Admission ..... Feb. 15, 1950
Date of Discharge ..... Feb. 21, 1950
Number of days hospitalized 6

Twenty-four year old American Seaman admitted for diagnostic work-up for alleged headaches since being hit on the head with a bottle on the SS MASON LYKES. *There was no history of unconsciousness and no other significant symptoms. P E X, including thorough neurological exam was negative for significant findings. Lumbar puncture revealed normal dynamics and chemistry cytology. Sulphates were negative. The E N T consultant who saw patient as out-patient, found no significant abnormalities. It is our impression that this man does not have any physical defect attributable to the alleged injury.*
J. C. Wright, S. A. Surgeon

X-Ray Report, 2/16/50

Skull Plates

No evidence of bone injury. There is a small area of calcification seen in the lateral film in the posterior portion of the skull the exact location and nature of which is unknown.

injury, R. 9. As petitioner has stated, this doctor reported finding three neurological signs and also related having noted a scar at the site of the injury, which the doctor stated indicated injury to the cerebellum, R. 11. However, on cross-examination, the strength of this testimony was diluted by the necessary admission that two of his objective findings (the facial asymmetry and nystagmus), could very well have been congenital in origin and not referrible to the injury. The Trial Judge obviously placed small trust in the conclusion of this doctor that petitioner was suffering from traumatic brain damage, since the doctor admitted that he had made no effort to determine whether or not nature, rather than trauma, was in fact the source of these positive signs, R. 24-25; 27-28; 34; 38; 41.

Respondent's medical expert first examined petitioner in August, 1950, just nine months after the trauma and two years and four months before petitioner was first seen by his own expert, and again shortly before the trial. *This neurologist stated categorically that petitioner did not sustain brain injury from the MASON LYKES episode.* His neurological examinations were entirely negative except for "questionable hypoesthesia" at the site of the scar, R. 168; 177, and the facial asymmetry reported also by the opposing doctor. However, as to these findings, the doctor added without reservation that *the facial asymmetry was beyond doubt congenital, not traumatic, in origin, and that the hypoesthesia was insignificant from a neurological standpoint*, R. 170; 179. Regarding the nystagmus and Babinski reported by petitioner's doctor, this doctor testified that these findings did not in fact exist, and added that in any event they were not neurologically significant without additional associated neurological deficiencies, which in this

case do not exist, R. 170; 173-174. Finally, this doctor testified that the scalp scar was not in the area of the cerebellum, as petitioner's expert had testified, but was at the mastoid and posterior parietal regions of the head and that the scar did not in the least suggest internal injury at that region, R. 182.

ARGUMENT

As can be seen, on the above record the question concerning petitioner's alleged brain damage turned exclusively on issues of fact. There was conflicting evidence on the issue, and of course the conflicts were for the District Court to resolve. The factual findings made by the District Judge were substantiated by the Public Health Service Hospital records, as well as by respondent's medical testimony. The Trial Judge, in resolving the conflicts between the Public Health Service findings and respondent's neurologist on the one hand, and the conclusion of petitioner's expert on the other, did not, as petitioner asserts, find that "petitioner . . . had brain damage"; he rather merely stated in passing that "some" tests indicated brain damage of "some kind". The important finding on this issue, ignored by petitioner, was that petitioner's trauma caused only "concussion and lacerations" and that the disability resulting therefrom lasted until February 21, 1950, see Trial Court's Findings of Fact, Nos. 10 and 26. Accordingly, on the record, not only was the asserted brain damage only an issue of fact, but on the scanty evidence offered by petitioner to support his claim the Trial Court was wholly justified in the conclusion it reached.

Petitioner's invocation of the doctrine laid down in *McAllister*[3] seems to us wholly out of place here, for that decision, far from standing for the position maintained by petitioner, represents to us the zenith of this Court's holding that findings of fact made by a District Judge are not to be disturbed on appeal.

CONCLUSION

It is respectfully submitted that the decisions of the two courts below on this pure question of fact are in accordance with law, are not "clearly erroneous" but, on the contrary, were a proper resolution of conflicting medical evidence, and therefore there is no basis for the granting of the writ, and thus certiorari should be denied.

Respectfully submitted,

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[3]347 U. S. 932, 75 S. Ct. 6 (1954).

CERTIFICATE

I certify that I have served copies of the foregoing brief on counsel for all parties of record by mailing them to their respective offices, this _____ day of _____, 1956.

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William E. Wright